

FREQUENTLY ASKED QUESTIONS REGARDING THE NEW PUBLIC CONSTRUCTION REFORM LAW*

Chapter 193 of the Acts of 2004, entitled "*An Act Further Regulating Public Construction In the Commonwealth*" was signed into law on July 19, 2004. Chapter 193 and a subsequent amendment to the law made by Chapter 507 of the Acts of 2004 changed public construction statutes, thresholds, and procedures to be followed for public construction projects. Highlights of the new law include: new higher thresholds for general and filed sub-bidders; DCAM certification requirements for filed sub-bidders; prequalification requirements for both general bidders and filed sub-bidders on certain public building projects; an owner's project manager requirement for certain projects; an MBE/WBE program requirement for state funded municipal projects; and a new statute, M.G.L. c. 149A, created to permit the use of the construction manager at risk alternative delivery method on larger public building construction projects. In addition, the new law permits the use of the design build construction delivery method for larger public works projects.

****PLEASE BE ADVISED THAT THE INFORMATION PROVIDED ON THIS WEBSITE WILL BE UPDATED REGULARLY. THEREFORE, PLEASE BE SURE TO CHECK THIS WEBSITE FREQUENTLY AND CONSULT WITH YOUR LEGAL COUNSEL FOR ADDITIONAL INFORMATION.***

GENERAL INFORMATION

1. When does the new public construction reform law take effect?

ANSWER: Chapter 193 of the Acts of 2004, the new public construction reform law, was signed into law on July 19, 2004. The new law is effective immediately, with the exception of Sections 18 and 27, pertaining to the new requirements for sub-bidder certification and alternative procurement delivery methods, respectively, which do not become effective until January 1, 2005 with sub-bidder Certificates of Eligibility and Update Statements required to accompany filed sub-bid submittals on January 1, 2006.

2. If I am an awarding authority and have already commenced or undertaken a public building construction project, will the new law apply to my project?

ANSWER: Depending on the status of your project, at least certain portions of the new law will apply to your project. You are advised to seek an opinion of your legal counsel to ensure that you are in compliance with the new requirements.

3. Where can I obtain a copy of the new law?

ANSWER: You can access a copy of the new law on the following link to The General Court of Massachusetts' website:

<http://www.mass.gov/legis/laws/seslaw04/sl040193.htm>

4. What are the most significant changes in the new law?

ANSWER: The reform law contains some of the most significant revisions to the public construction process in nearly a quarter century. Since it would be difficult to list all the changes here, we have listed the most significant changes. The reform law:

- increases the threshold requiring individual filed sub-bids for designated trade work from \$10,000 to \$20,000;
- increases the threshold for projects requiring filed sub-bids and DCAM contractor certification from \$25,000 to \$100,000;
- requires an owner's project manager for projects valued at \$1.5 million or more;
- requires DCAM certification of subcontractors submitting filed sub-bids after January 1, 2006;
- requires "prequalification" of general contractors and filed sub-bid subcontractors by awarding authorities (on a project-by-project basis) for all projects with estimated construction costs of \$10 million or more;
- provides awarding authorities with the option to utilize an owner initiated "prequalification" process for either or both general bidders and filed sub-bidders where estimated construction costs are \$100,000 or more, but less than \$10 million (prequalification is mandatory for \$10 million or more);
- filed sub-bid subcontractors must furnish payment and performance bonds on projects where prequalification is required or utilized by the awarding authority;
- requires municipal awarding authorities to incorporate an Affirmative Marketing Program with design and construction participation goals for

minority business enterprises and women business enterprises (MBE/WBE) on state assisted building projects;

- provides awarding authorities with the option to use CM at Risk on building projects over \$5 million (with the prior approval from the Office of the Inspector General) effective January 1, 2005;
- provides awarding authorities with the option to use Design Build on non-building public works projects estimated to cost \$5 million or more (with the prior approval of the Office of the Inspector General) effective January 1, 2005;
- modifies the procurement process for building projects with estimated construction costs of \$100,000 or less and separates them into three categories: less than \$10,000; \$10,000 to \$25,000; and \$25,000 to \$100,000;
- allows the designer on municipal projects who conducted the feasibility study to continue with the design of the project without mandatory peer review;
- requires municipalities to utilize the standard designer selection form issued by the Designer Selection Board ("DSB").

Please be advised that this is just a summary of some of the most significant changes in the law and you should always consult with your legal counsel for any specific questions regarding the changes implemented in Chapter 193.

5. How are smaller building construction project procurements estimated to cost \$100,000 or less conducted under the new law?

ANSWER: The procurement process for smaller building construction projects estimated to cost \$100,000 or less is divided into three (3) categories under the new law as follows:

- If the estimated building construction cost of the project is less than \$10,000 an awarding authority must seek no fewer than three written quotes and award the contract to the person offering the lowest written price quotation.
- If the estimated building construction project cost is not less than \$10,000 but is not more than \$25,000 the contract must be advertised via a public notification process for at least 2 weeks and an award

must be made to the responsible person offering the lowest price via written submission.

- If the estimated building construction project cost is not less than \$25,000 but is not more than \$100,000 an advertised sealed bid process must occur and award must be made to the lowest responsible and eligible bidder in accordance with M.G.L. c. 30, §39M.

For projects with estimated construction costs of less than or equal to \$100,000, DCAM certification is not required for either general contractors or filed sub-bidders.

6. Does the new law affect emergency waiver requests?

ANSWER: No, although the thresholds have changed for bidding of public building work, an awarding authority must still seek written approval of DCAM if any variance with the new bidding and/or advertising requirements is necessary because an extreme emergency exists involving the health, safety or security of persons or property.

7. Were there any changes to the procedure for the selection of a designer for municipal projects?

ANSWER: Yes. The designer who conducted the feasibility study for a municipality may now continue with the design of the project. An independent review of a feasibility study is now optional rather than mandatory. The Designer Selection Board ("DSB") has developed a standard designer selection form to be used by all cities, towns, and public agencies not within the jurisdiction of the designer selection board. A copy of this form is available at the following link: http://www.mass.gov/cam/DSB/fi_dselectboard_ct.html.

Also, be advised that for any municipal design project that includes funding provided by the Commonwealth, in whole or in part (such as reimbursements, grants, and the like), awarding authorities must have MBE and WBE goals incorporated into the design procurement which are consistent with the participation goals established by DCAM in consultation with SOMWBA.

8. What are the advertising or public notice requirements if I want to use the same designer for both the feasibility study and the final design of my building project?

ANSWER: Massachusetts General Laws, chapter 7, section 38D governs the advertising requirements for the procurement of design services and provides

that "a description of the project, including the specific designer services sought and other information must be included in the public notice". If the scope of work specified in the advertisement for the feasibility study also states that the scope may include final design then you do not have to readvertise for the final design work if you elect to use the same designer. Otherwise, even if you plan to use the same designer for both the feasibility study and the final design, you will need to re-advertise.

9. What is "COMM-PASS" and how can we get access to it?

ANSWER: "Comm-PASS" is the acronym for Commonwealth's Procurement Access & Solicitation System located on the internet at <http://www.comm-pass.com/>. Over 2000 Massachusetts public awarding authorities utilize Comm-PASS to post public notice of their procurements on the internet. Awarding authorities have access to post their procurements on Comm-PASS FREE OF CHARGE upon completion of FREE training offered by the Commonwealth's Operational Services Division (OSD). You should contact OSD directly for information on coordinating training.

Access to Comm-PASS to review both current and closed solicitations is available free of charge to vendors and the public. By regularly reviewing Comm-PASS vendors desiring to do business with public entities in the Commonwealth are able to easily access information on potential projects as they are advertised. For a small annual subscription fee vendors that choose to subscribe can also get enhanced services such as instant notification when new postings are added to Comm-PASS for the types of procurements they are interested in.

10. What is an owner's project manager?

ANSWER: Under the new law, an "owner's project manager" is defined as "an individual, corporation, partnership, sole proprietorship, joint stock company, joint venture, or other entity engaged in the practice of providing project management services for the construction and supervision of construction of buildings." The new law requires awarding authorities to contract for the services of an owner's project manager prior to contracting for design services where the project is estimated to cost \$1.5 million or more. The owner's project manager must have certain minimum experience requirements and is prohibited from having any affiliation with the designer, contractor, or any other party having an interest in the project. An agency or municipal employee may serve as the owner's project manager, providing he or she meets the required minimum qualifications.

DCAM has published guidelines pertaining to the role of the owners project manager on its website which are available at the following link:

http://www.mass.gov/cam/Creform/Own_PM_Guide.pdf

11. What is the process for selecting an owner's project manager?

ANSWER: While the new law provides that "[t]he public agency shall use a qualifications based selection process to procure the services of an owner's project manager," it does not provide any guidance on how that selection process should be conducted. Under the circumstances, it seems reasonable to assume that utilizing a qualifications based selection process consistent with the process defined in Chapter 7 sections 38A through 38O of the General Laws for the procurement of design services would be a sufficient manner in which to procure the owner's project manager services.

12. Does a public agency have to hire an "owner's project manager" for an ongoing building construction project of \$1.5 million or more?

ANSWER: It depends on what stage the project was in when the new law took effect on July 19, 2004. An awarding authority is not required to hire an owner's project manager if the project was already in the construction phase and the construction contracts were executed prior to that date.

PREQUALIFICATION AND CERTIFICATION

13. What is the difference between "Prequalification" and "Certification" under the new law?

ANSWER: "*Prequalification*" is a new process for both general contractors and subcontractors which is mandatory on all public construction projects with estimated construction costs of \$10 million or more (unless the project is undertaken by an exempt agency). Prequalification is optional at the discretion of the awarding authority where the estimated construction costs are less than \$10 million but greater than \$100,000. As set forth in Section 19 of Chapter 193, the prequalification process is administered by the awarding authority on a project-by-project basis. DCAM is in the process of promulgating regulations and guidelines to implement the new prequalification process. You should regularly check the DCAM website at <http://www.mass.gov/cam/> for updated information on the status of the prequalification regulations, guidelines and the

implementation schedule. In the meantime, however, Section 19 provides detailed guidance on the required process and criteria.

"Certification" is a screening process conducted only by DCAM to determine whether a contractor or subcontractor meets certain minimum criteria to perform work on public building contracts estimated to cost \$100,000 or more procured under Chapter 149, §44A. Under the prior law, only general contractors were required to be certified by DCAM. The new law now also requires that as of January 2006, trade contractors who are filed sub-bidders must be certified in order to bid public building construction work. DCAM is currently processing sub-bidder certification applications. The new certification process for filed sub-bidders is set forth in Section 18 of Chapter 193. Upon a firm's submission of the required application and supporting documents to DCAM, DCAM will review and determine whether the firm meets the certification standards and, if warranted, issue a "Certificate of Eligibility" evidencing DCAM certification. For your information, DCAM has posted a Notice on Subcontractor Certification on its website. Upon completion of that effort, regulations and guidelines pertaining to certification of both general bidders and filed sub-bidders under the new law will be published in the *Central Register* and on DCAM's website at <http://www.mass.gov/cam>.

14. What is the status of DCAM's proposed regulations regarding certification and prequalification?

ANSWER: DRAFT copies of the regulations were published for public comment on February 25, 2005 on DCAM's website and in the Central Register. A public hearing was held on March 4, 2005 and the public comment period ended on March 31, 2005. DCAM has incorporated appropriate changes to the DRAFT regulations and expects the final regulations to be promulgated by the end of April 2005. You should check DCAM's website frequently for any updates on the status.

15. How do the new immediate prequalification requirements impact the procurement of public building construction contracts?

ANSWER: As set forth in Section 19 of Chapter 193, amendments to M.G.L. c. 149 now specify that it is mandatory for awarding authorities to prequalify general bidders and filed sub-bid subcontractors for public building construction projects where the total construction cost is estimated at \$10 million or more. In addition, an awarding authority may prequalify general contractors and filed sub-bidders for projects with an estimated construction cost of \$100,000, but not to exceed \$10 million. It should also be noted that certain state agencies are exempt from mandatory prequalification, but may elect to require it at their sole

option. The exempt agencies are as follows: (a) DCAM; (b) the Massachusetts Port Authority; (c) the Massachusetts Water Resources Authority; (d) the Massachusetts State Colleges Building Authority; and (e) the University of Massachusetts Building Authority.

16. How does prequalification work?

ANSWER: Prequalification is a “two phase” procurement process.

- In the first phase, the awarding authority issues by public notice a *Request for Qualifications* (“RFQ”) seeking statements of qualification from prospective general bidders and filed sub-bidders. Upon receipt of applications for qualification, the awarding authority reviews the submissions and qualifications of prospective contractors in accordance with the legal criteria and makes a determination as to which firms meet the prequalification standard. Only firms deemed prequalified may then participate in the second phase of the procurement.
- In the second phase, the awarding authority invites bids from only those general bidders and filed sub-bidders identified by the awarding authority as “qualified” to bid. The remainder of the bidding process and the award of the contract will then be conducted in accordance with the existing procedures set forth in Chapter 149.

17. As an awarding authority, why should I consider mandating prequalification where the project is below the required threshold of \$10 million?

ANSWER: An awarding authority may elect to require prequalification for general bidders and filed sub-bidders as an additional assurance that the pool of participating bidders has the requisite experience and qualifications to perform the work.

18. What is a Request for Qualifications (“RFQ”)?

ANSWER: An RFQ is issued by the awarding authority to initiate the prequalification process for general bidders and filed sub-bidders. The RFQ is made by public notice and details the following information regarding the public building project:

- the time and date for receipt of responses to the RFQ, the address of the office to which the responses are to be delivered, and the timeframe in which the public agency will respond to said responses;

- a general description of the project and, for prequalification of filed sub-bid subcontractors, a general description of the subcontractor's class of work;
- the evaluation procedure and the criteria for prequalification of general bidders and filed sub-bidders, including the point rating system and the schedule for the evaluation process;
- the anticipated schedule and construction costs for the building project;
- a listing of the project team, including the awarding authority, the designer, and awarding authority's owner's project manager, if applicable;
- a statement that the RFQ will be used to prequalify general bidders and filed sub-bidders who will be invited to submit a bid pursuant to sections 44E and 44F;
- a prohibition against any unauthorized communication or contact with the public agency outside of official pre-bid meetings, and if desired;
- any limitation on the size and number of pages to be included in the response to the RFQ desired by the public agency.

19. What information must be included in a statement of qualifications submitted in response to an RFQ?

ANSWER: Under Section 19 of Chapter 193, amendments to M. G. L. c. 149 specify that awarding authorities can require only four categories of information in the statement of qualifications from prospective general bidders and sub-bidders. Generally, these categories of information are: (1) management experience; (2) references; (3) capacity to complete the project; and (4) the mandatory requirements of a written commitment from a bonding company to issue payment and performance bonds for the full value of the project and a DCAM Certificate of Eligibility and an Update Statement. The financial information submitted with the RFQ application shall not be considered a public record.

The criteria and weight given to each of these categories of information supplied by the prospective bidder is set forth in more detail in Section 19. In addition, DCAM is in the process of promulgating regulations and guidelines to implement the prequalification process. You should regularly check the DCAM website at

<http://www.mass.gov/cam/> for updated information on the status of the prequalification regulations, guidelines and implementation schedule.

20. Will there be standardized RFQ forms and SOQ forms for prequalification to be used by awarding authorities and interested general contractors/subcontractors?

ANSWER: Yes, DCAM intends to issue standardized RFQ and SOQ forms when it issues its *DCAM Guidelines for Prequalification*. In order to foster consistency and compliance with M.G.L. c. 149, §§ 44D½ and 44D¾ these forms once completed (or forms consistent with these forms) will be required to be used by awarding authorities and interested general contractors and subcontractors participating in the prequalification process. Electronic versions of these forms will be available to awarding authorities for use on their procurements.

21. What is the evaluation process for determining prequalification?

ANSWER: Under Section 19 of Chapter 193 amendments to M.G.L. c. 149, an awarding authority is first required to establish a *Prequalification Committee* for each public building construction project where prequalification is mandated or elected by the awarding authority. The prequalification committee consists of one representative from the designer and three representatives from the awarding authority. The prequalification committee is required to evaluate and weigh the qualifications of each applicant firm in accordance with the criteria specified in the RFQ and make a determination as to whether the applicant is qualified to bid on the project. Be advised that according to the statute, the decision of the *Prequalification Committee* is final and is not subject to appeal unless there is evidence of fraud or collusion.

While DCAM is in the process of promulgating regulations and guidelines to implement the new prequalification process DCAM is not the enforcement agency charged with review of the prequalification process utilized by other awarding authorities. In the event that you believe there has been an irregularity in the prequalification process utilized by a particular awarding authority, you are advised to seek counsel and/or contact the Bid Protest Unit of the Office of the Attorney General. .

22. What happens if we prequalify fewer than 3 firms to submit bids?

ANSWER: Chapter 507 of the Acts of 2004 amended Chapter 193 of the Acts of 2004 to clarify the options available to an awarding authority when it prequalifies fewer than 3 general contractors or filed sub-bidders in a particular trade.

If the prequalification is mandatory (the estimated construction cost of the project is \$10 million or more) and the awarding authority is not able to prequalify at least 3 general contractors or subcontractors in a particular filed sub-bidder trade category to submit bids, then the awarding authority shall reject all responses and issue at least 1 new request for qualifications. If the awarding authority is still not able to prequalify at least 3 general contractors or subcontractors in a particular filed sub-bidder trade after at least 2 attempts at prequalification, then the awarding authority has the option to do one of the following:

- attempt prequalification again; or
- invite general or filed sub-bids pursuant to M.G.L. c. 149, §§44A through 44J; or
- if the awarding authority has prequalified at least 2 general contractors (or filed sub-bidders in a particular trade) then the awarding authority may invite general bids or filed sub-bids from the 2 prequalified general contractors or subcontractors.

If the prequalification is optional (the estimated construction cost of the project is more than \$100 thousand but not more than \$10 million) and the awarding authority is not able to prequalify at least 3 general contractors or subcontractors in a particular filed sub-bidder trade category, then the awarding authority is not required to attempt prequalification again but instead automatically has the option to:

- attempt prequalification again; or
- invite general or filed sub-bids pursuant to M.G.L. c. 149, §§ 44A through 44J; or
- if the awarding authority has prequalified at least 2 general contractors (or subcontractors in a particular filed sub-bidder trade category) then the awarding authority may invite general bids or filed sub-bids from the 2 prequalified general contractors or subcontractors.

23. **If we have prequalified less than 3 general contractor or subcontractor firms in a particular filed sub-bid trade category but need to attempt prequalification again (either mandatory or at the option of the awarding authority) do the general contractor or subcontractor firms that we have already deemed prequalified in response to the initial or prior RFQ have to re-apply for prequalification in response to the new RFQ?**

ANSWER: No, they will not have to reapply. The prequalification regulations will provide that an awarding authority may stipulate that all general contractors or subcontractors in a particular filed sub-bidder trade category that were prequalified by an awarding authority to submit a bid during the initial or prior prequalification process shall remain prequalified for that building project, without the need to further respond to a re-issuance of the RFQ, for a maximum of 120 days from the due date of the responses to the original RFQ.

24. **So if there is mandatory prequalification and we are able to prequalify 3 firms in some sub-bidder categories but not all of them, do we have to repeat the prequalification process for all categories?**

ANSWER: No, you would only have to repeat the prequalification process for the sub-bidder categories where you were not able to prequalify 3 firms.

25. **Is there a "math error" in the new statute since the minimum points required in each prequalification category only add up to 50 points but the statute requires a minimum of 70 points to be prequalified?**

ANSWER: No, in addition to the required minimums set forth in each category which total 50 points (management 25, references 15 and capacity 10) firms seeking prequalification must also achieve an additional 20 points across the categories for a total of at least 70 points overall to be prequalified.

26. **As an awarding authority, if we initiated our project before the new law was enacted on July 19, 2004, do we still have to prequalify general bidders and sub-bidders?**

ANSWER: It depends on what stage the project was in when the new law took effect on July 19, 2004. If you had already opened file sub-bids or general bids prior to July 19, 2004, then you do not have to prequalify and re-bid. If you did not open bids prior to July 19, 2004, however, you should check with your legal counsel to determine whether prequalification is required.

27. What is a *Certificate of Eligibility*?

ANSWER: A *Certificate of Eligibility* is a one page document issued annually by DCAM on DCAM letterhead that confirms that a general bidder or filed sub-bidder is DCAM certified and permitted to bid on public building constructions projects. A *Certificate of Eligibility* may be issued to a contractor or subcontractor upon completion of the application and review process conducted by DCAM. The certificate will contain the name of the contractor, the area or areas of work in which it is certified and other relevant information. All prospective general bidders and filed sub-bidders (for sub-bidders the requirement is effective with bids submitted as of January 1, 2006) must submit the certificate of eligibility with their bids on public building construction contracts where the general contract is estimated to exceed \$100,000 and the subcontract is estimated to exceed \$20,000 and the awarding authority has identified the subcontract work as filed sub-bid work, in accordance with Section 44F of M.G.L. c. 149.

28. What is an *Update Statement*?

ANSWER: An *Update Statement* is a standard DCAM form required to be completed and signed by the contractor and submitted by all general bidders and filed sub-bidders with their bids on public building construction projects requiring DCAM certification of general and filed sub-bidders.

29. If I am certified as a general contractor for a particular trade under the prior law for certification of prime contractors, will I be certified as a sub-bidder for that trade under the new law for sub-bidder certification?

ANSWER: Yes. You should receive a sub-bidder Certificate of Eligibility at the same time that you receive your prime contractor Certificate of Eligibility. You should review the Notice on Subcontractor Certification on DCAM's website at <http://www.mass.gov/cam/>.

30. If I am a subcontractor intending to submit a sub-bid on a public construction project, will I need to have a certificate of eligibility from DCAM by the January 1, 2005 effective date in order to bid?

ANSWER: No. Chapter 507 of the Acts of 2004 amended the deadline of January 1, 2005 in Chapter 193 of the Acts of 2004 to allow DCAM until December 31, 2005 to implement the new subcontractor certification process. In order to complete the implementation of subcontractor certification in 2005, DCAM has developed a quarterly schedule for the certification of certain trades in each quarter of 2005. The schedule, application forms and all other information

relative to the certification implementation process is posted on DCAM's website at <http://www.mass.gov/cam>. The schedule for subcontractor is as follows:

- 1st Quarter: HVAC
plumbing
miscellaneous metals/ornamental irons
- 2nd Quarter: elevators
electrical
lathering and plastering
painting
- 3rd Quarter: masonry
waterproofing, damping & caulking
metal windows
glass and glazing
roofing and flashing
- 4th Quarter: resilient flooring
tile
terrazzo
marble
accoustical tile
*fire protection

31. As a public awarding authority, do I need to reject bids from filed sub-bidders that are not DCAM certified as of January 1, 2005?

ANSWER: No. While DCAM has begun the certification of subcontractors, Chapter 507 of the Acts of 2004 allows DCAM and subcontractors until December 31, 2005 to complete the implementation of this new subcontractor certification process. While subcontractors are being issued certificates of eligibility in accordance with DCAM's quarterly schedule during 2005, awarding authorities can not give such certificates any priority weight in selecting contractors to perform public work and must continue to accept bids from sub-bidders who are not yet DCAM certified on public construction projects throughout 2005. You should, however, regularly check the DCAM website at <http://www.mass.gov/cam/> for updated information on the status of subcontractor certification and the regulations, guidelines and implementation schedule.

Also, effective immediately, an awarding authority may elect to utilize the new prequalification process to prequalify sub-bidders, if the construction costs for the project are estimated to exceed \$100,000. (For projects with estimated construction costs of \$10 million or more, the prequalification process is mandatory).

32. What types of subcontractors will need to be certified under the new law?

ANSWER: As set forth in Section 18 of Chapter 193, effective January 1, 2005, all sub-bidders intending to submit a filed sub-bid for a public building construction project subject to Chapter 149 §44A with an estimated general contract cost in excess of \$100,000 are required to be certified by DCAM. As noted in Chapter 149, §44F, filed sub-bidding occurs where there is an estimated subcontract cost for the particular trade in excess of \$20,000 and where the work falls into one of the classes of work identified in §44F and by the awarding authority in the bid documents.

AFFIRMATIVE MARKETING PROGRAM

33. As a municipal awarding authority, how do the new affirmative marketing program requirements specified in the new law impact the procurement of public design and construction contracts?

ANSWER: For any municipal design or construction project that includes funding provided by the Commonwealth, in whole or in part (such as reimbursements, grants and the like), awarding authorities will need to have MBE and WBE goals incorporated into both the design and construction procurement. The current applicable MBE and WBE goals developed by DCAM in consultation with SOMWBA are 8% MBE and 4% WBE on design contracts and 7.4% MBE and 4% WBE on construction contracts. Guidelines with information about reductions or waivers of such goals in appropriate circumstances are being developed. For further information on waivers contact DCAM or SOMWBA. SOMWBA has oversight responsibility of the affirmative marketing program for state assisted municipal projects.

34. What is an MBE or WBE?

ANSWER: An MBE or WBE is a minority-owned or women-owned business enterprise certified by the State Office of Minority and Women Business Assistance ("SOMWBA"). A list of currently certified MBEs and WBEs in the

design and construction fields is available on SOMWBA's website at <http://www.somwba.state.ma.us>.

ALTERNATIVE DELIVERY METHODS

CONSTRUCTION MANAGER AT RISK AND DESIGN BUILD

35. What is the Construction Management at Risk (CM at Risk) delivery method?

ANSWER: CM at Risk is an alternative to the traditional design-bid-build method of building as embodied in Chapter 149. A new statute, M.G.L. c. 149A, was created by Chapter 193 of the Acts of 2004 that provides the option to cities and towns (as well as public agencies) to use the CM at Risk method for building projects valued at \$5 million or more. Under CM at Risk, a public owner prequalifies and selects a Construction Manager (CM) during the design phase. The CM provides planning, estimating, scheduling and other consulting services to the Owner and Architect during the design phase. When the design is near completion, the CM and the awarding authority negotiate a Guaranteed Maximum Price ("GMP") and schedule. The CM then acts as the general contractor during the construction of the project and prequalifies and procures all of the construction trade contractors that will perform the work. The CM is required to share all cost information with the public owner so that an informed public owner will only pay for the Cost of the Work plus an agreed fee for the CM up to the GMP.

To use CM at Risk non-exempt public agencies must receive prior approval from the Office of the Inspector General and demonstrate that:

- an authorization from the appropriate governing body has occurred;
- the public agency has the capacity, a plan and procedures to procure and manage the CM at Risk services and has retained the services of a qualified owner's project manager;
- the public agency has procedures to ensure fairness in competition, evaluation, and reporting in every stage of the procurement process; and
- the project has an estimated construction value of \$5 million or more.

The Office of the Inspector General has promulgated regulations and procedures to implement the CM at Risk process. You should regularly check the IG website at <http://www.mass.gov/ig/> for updated information on the status of the CM at

Risk regulations, procedures, and the implementation schedule. The exempt agencies are DCAM, the Massachusetts Port Authority, the Massachusetts Water Resource Authority, the Massachusetts State Colleges Building Authority, and the University of Massachusetts Building Authority.

36. May our city or town use the CM at Risk delivery method to construct our new school?

ANSWER: The Legislature has approved the CM at Risk delivery method for use on public building projects starting on January 1, 2005. To opt to use this delivery method the project must be estimated to cost \$5 million or more and the awarding authority must receive prior approval from the Office of the Inspector General. The Office of Inspector General has developed an *"Application to Proceed"* form for completion by awarding authorities seeking to use the CM at Risk delivery method. You should regularly check the Office of the Inspector General's website at <http://www.mass.gov/ig/> for updated information on the CM at Risk regulations, procedures, *Application to Proceed*, and the implementation schedule.

37. I have heard that there is an application process for awarding authorities to use the CM at Risk and Design Build delivery methods. What agency do we apply to?

ANSWER: The new law requires an awarding authority seeking to use either CM at Risk or Design Build to submit an *Application to Proceed* to the Office of the Inspector General providing detailed information about the project and the awarding authority's plans and procedures for managing the project. If the awarding authority meets specific requirements, the Office of the Inspector General will issue a Notice to Proceed with the procurement. The Office of the Inspector General has promulgated regulations and procedures to implement the CM at Risk and Design Build processes. You should regularly check the Office of the Inspector General's website at <http://www.mass.gov/ig/> for updated information on the CM at Risk and Design Build regulations, guidelines, and the implementation schedule.

38. Will the team assembled by our town be required by the application process to demonstrate expertise in the use of the CM at Risk delivery method?

ANSWER: Yes. In the application submitted to the Inspector General's Office, you should be prepared to demonstrate at a minimum that your CM at Risk team:

- understands specific aspects of a two-phased qualifications-based procurement for a construction management at risk firm as outlined in the Act;
- has experience interpreting specific contract terms and requirements;
- understands the specific preconstruction or design phase tasks expected of the CM at Risk firm;
- has a plan for how the municipality will manage the GMP process;
- understands the concept of "open book" cost monitoring and has a policy on auditing project costs at project completion;
- has a plan for managing the monthly and final project requisition process;
- has a complete trade and "other subcontractor" procurement plan that will promote maximum qualified competition while assuring CM at Risk accountability for trade contractor work.

39. What are some of the benefits of my city using a CM at Risk delivery method?

ANSWER: Under CM at risk, a public agency may benefit by:

- The ability to prequalify and select your Construction Manager ("CM") on the basis of its reputation and record in controlling costs, meeting deadlines, and satisfying customers.
- The participation of the CM in design and phasing decisions so that "unbuildable" or costly design details or phasing plans may be avoided and design/drawing inconsistencies may be limited.
- The CM's ownership of the construction budget through early cost estimating leading to a Guaranteed Maximum Price ("GMP") for the work.
- The ability to "fast track" the start of construction by bidding early trade contracts which the CM will ultimately incorporate into the final GMP.

- The right and responsibility to monitor and audit the construction costs of the project to ensure the city pays only the costs of the work plus the agreed fee to the CM.
- A spirit of cooperation between the owner, architect, CM and trade contractors due to a defined allocation of project responsibilities and the CM's interest in obtaining strong references for future work.

40. Must our city or town wait until January 1, 2005 to prepare to use CM at Risk to construct our new library?

ANSWER: No. There are numerous steps that your town can take to assemble a qualified team to prepare for use of CM at Risk in advance of the January 1, 2005 implementation date. For example, you may:

- Conduct a solicitation for a qualified owner's project manager.
- Conduct a procurement process as outlined in Chapter 149A for a qualified designer.
- Establish a Prequalification Committee as outlined in Chapter 149A.

41. What are some of the similarities and differences between the CM at Risk delivery method versus the traditional design-bid-build method?

ANSWER: The primary similarities and differences between CM at Risk and design-bid-build are as follows:

- CM at Risk and design-bid-build require similar designer selection processes, however, the CM at Risk firm should be chosen early in the design process, unlike the design-bid-build method. This allows an opportunity for the CM to provide pre-construction services that may be beneficial to the awarding authority, such as early cost estimates, project planning and scheduling, value engineering and constructability studies, developing construction phasing strategies, determining filed sub-bid scopes of work, and assisting in prequalifying filed sub-bidders.
- Both the CM at Risk method and the design-bid-build method require an owner's project manager for projects with estimated construction costs of \$1.5 million or more.

- Both the CM at Risk alternative and the traditional design-bid-build method require the use of the new *Prequalification* process. For design-bid-build projects, prequalification is required where the estimated construction costs are \$10 million or more and optional, at the discretion of the awarding authority, where the estimated construction costs are less than \$10 million, but not less than \$100,000. By contrast, prequalification is mandatory on all CM at Risk projects, regardless of the size (i.e. not just projects with estimated costs of \$10 million or more). The prequalification process for CM at Risk, however, requires the submission of separate technical and price components from qualified firms and permits consideration of non-price components in the selection of a construction manager.
- Both methods require a filed sub-bid process. For design-bid-build projects, prequalification of sub-bidders is required where the estimated construction costs are \$10 million or more and optional at the discretion of the awarding authority where the estimated construction costs are less than \$10 million but not less than \$100,000. Under the design-bid-build method usually the contractor selects a sub-bidder from a list of filed sub-bidders developed by the awarding authority. In the context of CM at Risk, filed sub-bid category subcontractors are referred to as "Trade Contractors". Trade Contractors on all CM projects must be prequalified to bid, regardless of the estimated construction cost (i.e. not just projects with estimated costs of \$10 million or more). Under the CM at Risk process, the contractor selects the lowest sub-bidder from a list of prequalified sub-bidders and may have the option to negotiate the price if fewer than 3 bids are received.
- Under CM at Risk, the CM firm negotiates a guaranteed maximum price ("GMP") with the awarding authority, which price includes the fee for the CM services, the cost of the work, general conditions and contingency funds for the project. The CM firm may be responsible for costs that exceed the GMP.
- Under the CM at Risk method, there may be an opportunity for bidding early item work packages prior to the completion of the final design, thus accelerating the overall schedule for the project.

42. Will there be educational materials available to educate public officials about the use of CM at Risk and Design Build?

ANSWER: Yes. Training and materials are available through the Office of the Inspector General's MCPPO program. The Office of the Inspector General is providing a one-day course on each delivery method for procurement officials and others. Please check the Office of the Inspector General's website at <http://www.mass.gov/ig/> for additional information regarding training opportunities.

43. What is the Design Build delivery method available under the new law?

ANSWER: The Design Build delivery method is an alternative method of contracting available for public works and road construction projects in which a single contract is used for both design and construction services. A new statute, M.G.L. c. 149A, was created by Chapter 193 of the Acts of 2004 that provides the option to public agencies to use the Design Build method for public works projects estimated to be \$5 million or more. To use Design Build non-exempt awarding authorities must receive prior approval from the Office of Inspector General and demonstrate that:

- an authorization from the appropriate governing body has occurred;
- the public agency has the capacity and a plan and procedures in place to effectively procure and manage a design-build firm;
- the public agency has procedures to ensure fairness in competition, evaluation, and reporting; and
- the project has an estimated construction value of \$5 million or more.

The Office of the Inspector General has promulgated regulations and procedures to implement the Design Build process. You should regularly check the IG website at <http://www.mass.gov/ig/> for information on the Design Build regulations, procedures, and the implementation schedule. The exempt agencies are the Massachusetts Highway Department, the Massachusetts Port Authority, and the Massachusetts Water Resources Authority.

44. In what instances may our city or town use the new Design Build delivery method?

ANSWER: The Legislature has approved the Design Build delivery method for use by awarding authorities for public works (not building projects) estimated to cost \$5 million or more if the awarding authority has received approval from the Office of the Inspector General. The effective date for the use of the Design Build delivery method is January 1, 2005.

45. How do I receive approval to use Design Build from the Office of the Inspector General?

ANSWER: The new law requires an awarding authority seeking to use design build to submit an application to the Inspector General's Office providing detailed information about the project and the awarding authority's plans and procedures for managing the project. If the awarding authority meets specific requirements, the Inspector General will issue a Notice to Proceed with the design build procurement.

The Office of the Inspector General has promulgated regulations and procedures to implement the design build process. You should regularly check the IG website at <http://www.mass.gov/ig/> for updated information on the design build regulations, guidelines, and the implementation schedule.